No. 89-901

MOTION FILED JAN 5 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.R. GRACE & CO.—CONN.,
Petitioner,
v.

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA and THE STATE TAX APPEAL BOARD OF THE STATE OF MONTANA,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AND THE MONTANA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Committee on State Taxation of the Council of State Chambers of Commerce and the Montana State Chamber of Commerce hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the Attorney for the Petitioner has been obtained. The consent of the Attorney for the Respondent was requested and refused, although it was represented that the Respondent would not oppose this motion.*

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* The consent of the Petitioner and response of the Respondent have been filed with the Clerk of this Court.

The Montana Chamber of Commerce (Chamber) has approximately 1,000 members and includes small and large businesses located in Montana. The Chamber's purpose is to achieve a strong economic environment in Montana which will promote growth and development in the State. The Chamber is, therefore, involved in all issues impacting Montana businesses, including tax issues, and is greatly concerned with maintaining the fairness and integrity of Montana's tax system. Since all of its members are affected by the State's tax system, the Chamber has a considerable interest in insuring that its members have access to a fair and impartial hearing procedure when disputes regarding the State's tax system arise.

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce, including the Montana Chamber of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the Council, consists of 330 corporate members, including petitioner, who conduct a substantial portion of the interstate commerce of United States taxpayers. COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of corporations doing business in more than one taxing jurisdiction. This objective is accomplished, in part, through the promotion of procedural rights of taxpayers so that when a dispute arises with a taxing jurisdiction the taxpayer is given a full and fair opportunity to contest the legality of the state's action. COST is, therefore, vitally interested in cases such as the instant case in which the State of Montana's tax litigation process operates in such a way so as to deny taxpayers their procedural due process rights.

At issue in this case is a taxpayer's fundamental right to a full and fair hearing before an impartial decisionmaker in contested tax cases as protected by the Fourteenth Amendment. In this, and other cases, STAB, with the complicity of the Department of Revenue, has vio-

lated taxpayers' due process rights by its procedure of secretly contacting the Department of Revenue and requesting the Department to draft the findings and order to be adopted by STAB and purposely denying taxpayers notice of the *ex parte* contacts and the opportunity to fully and equally present their cases.

The denial of due process rights in contested tax cases is an issue affecting all Montana taxpayers. Thus, this issue is of major importance to COST and the Chamber. COST and the Chamber therefore urge that leave be granted to file a brief as *amici curiae* in support of Petitioner's petition for writ of certiorari and respectfully so move the Court.

Respectfully submitted,

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Dated: January 5, 1990

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AND THE MONTANA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce and the Montana Chamber of Commerce as *amici curiae* in support of the petitioner's petition for writ of certiorari in the above-captioned case.

INTEREST OF *AMICI CURIAE*

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce and the Montana Chamber of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amici Curiae*.

SUMMARY OF ARGUMENT

This case presents an issue of major importance to all taxpayers. Disputes between taxpayers and taxing authorities will always exist. Therefore, it is essential, and a Constitutionally protected right, that taxpayers have available to them an impartial forum in which they may have those disputes adjudicated. It is further essential, and a Constitutionally protected right, that this impartial forum afford taxpayers a full and fair opportunity to present their cases. The procedure used by the Montana State Tax Appeals Board (STAB) in this case, in which it contacted the Department of Revenue (Department) *ex parte*; made a secret request to the Department to draft the findings and order; and adopted those findings and order without any notice to the taxpayer, denies the taxpayer its due process rights under the Fourteenth Amendment to the United States Constitution by tainting the impartiality of the proceeding and denying the taxpayer a full opportunity to be heard.

Ex parte communications to a decision-maker are prohibited as fundamentally at variance with due process rights. The *ex parte* contacts that took place in the instant case had the effect of abrogating the role of the impartial decision-maker and denying taxpayer its right to a full and fair hearing. Further, this not an isolated instance in that STAB has used this procedure to deny due process rights to taxpayers other than the petitioner in this case. See, *Pacificorp v. The Department of Revenue and State Tax Appeal Board*, Montana First Judicial District Court, Lewis and Clark County, No. CDV-89-344 Slip Op. (11/21/89).[1] It is necessary that this Court clarify that actions such as those taken by STAB are not consistent with due process and to assure that all taxpayers are given a fair opportunity to present their

[1] In this case, the District Court vacated and remanded STAB's decision in favor of the Department because the *ex parte* contacts violated Montana Statutes Section 2-4-613.

cases and have those cases decided in an open, unbiased hearing.

ARGUMENT

THE ADOPTION OF FINDINGS AND ORDER SUBMITTED TO A DECISION-MAKER *EX PARTE* VIOLATES THE RIGHT TO A FAIR HEARING UNDER THE DUE PROCESS CLAUSE

Due process expresses the requirement of fundamental fairness. *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, *rehearing denied*, 453 U.S. 927 (1981). The due process clause entitles a person to an impartial and disinterested tribunal in civil cases. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The principle that a fair trial in a fair tribunal is a basic requirement of due process applies to administrative agencies which adjudicate as well as to courts. *Withrow v. Larkin*, 421 U.S. 35 (1975). The requirements of due process mandate that an administrative hearing will constitute a fair trial conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. *Lloyd Carr & Co. v. Commodity Futures Trading Commission*, 567 F.2d 1193 (2d Cir. 1977). It has been recognized that ". . . ex parte communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process." *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977).[2]

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[2] This is recognized by the practicing bar and the judiciary. The Model Code of Professional Responsibility EC 7-35 (1980) provides:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, *a lawyer should not communicate with*

The procedure used by STAB and the Department in this and other tax cases flagrantly violates the standards set forth above. The procedure is patently unfair to the taxpayer. STAB does not allow each litigant an equal opportunity to present their case through the submission of proposed findings of fact and decision, served on the opposite side with an opportunity to respond. Rather, after the hearing, it secretly contacts the Department and asks the Department to draft the findings and order, which are never shown to the taxpayer prior to their adoption by STAB as its final decision. Even then, the taxpayer is never told that the Department's attorney prepared STAB's findings and order. The taxpayer is not allowed an equal opportunity to present its case or a full opportunity to respond to the case presented by the Department. Thus, the one-sided case presented by the Department in secret becomes STAB's decision when it adopts the findings and order prepared by the Department.

This Court has recognized the dangers inherent in a court's verbatim adoption of findings of fact prepared by prevailing parties in that a great potential for overreaching and exaggeration on the part of the attorneys preparing the findings is created when they have already been informed that the judge has decided in their favor. *An-*

> *a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer.* Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client. (Emphasis added.)

Similarly, the Code of Judicial Conduct for United States Judges Canon 3(A)(4) (1979) provides, in part:

> A judge should . . . neither initiate nor consider *ex parte* . . . communications concerning a pending or impending proceeding.

derson v. City of Bessemer, 470 U.S. 564 (1985). Such overreaching and exaggeration have a lasting prejudicial impact on the losing party. Since, on review, the reviewing court is bound by the findings of the lower court that are applied in reaching a legal determination, the losing party has no real opportunity to respond to the factual findings and faces an insurmountable burden on appeal. The essence of a hearing is that it is the forum for parties to be heard regarding the facts of their case. Here, however, STAB has denied taxpayers that forum.

Further, a proposed order or opinion serves as an additional opportunity for a party to brief and argue its case and thus is unfair to the party not accorded an opportunity to respond. *In re Colony Square*, 819 F.2d 272 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1271 (1988). Again, STAB's procedure of secretly contacting the Department in order to have the Department draft its findings and opinion denies a taxpayer its opportunity to present its caes and, therefore, creates a situation so fundamentally unfair so as to violate the taxpayer's right to due process.

This Court has not addressed whether a procedure such as that used by STAB violates due process. In *Anderson v. City of Bessemer*, *supra*, in which this Court did not find any procedural violation resulting from the court's use of findings prepared by the prevailing party, the other party was provided and availed itself of the opportunity to respond to the findings submitted by the prevailing party. Thus, the secret *ex parte* contacts that are at the heart of the constitutional violation by STAB were not present in *Anderson*. Much closer to the instant case is *Chicopee Mfg. Corp. v. Kendall*, 288 F.2d 719 (4th Cir.), *cert. denied*, 368 U.S. 825 (1961). In this case, a preliminary order was issued after both parties filed briefs setting forth applicable principles of law and findings of fact in general terms. However, one month later, an elaborate opinion with specific findings of fact was filed which had been prepared by the attorneys of the

plaintiff upon the request of the judge without notice to the attorneys for the defendant. The judge adopted the findings and opinion without material change. The Circuit Court stated that the practice of the adoption of findings of fact and conclusions of law submitted by the successful party

> involves the failure of the trial judge to perform his judicial function and *when it occurs without notice to the opposing side, as in this case, it amounts to the denial of due process.* (emphasis added; 288 F.2d at 724, 725.)

The procedure used by STAB goes well beyond any of the *ex parte* procedures that have been upheld by the federal courts of appeals. *In re Colony Square Co., supra,* involved a bankruptcy proceeding motion which was extensively briefed by both parties. Although the order signed by the judge was essentially identical to the order prepared by the prevailing party after an *ex parte* contact from the judge, the judge had outlined to the prevailing counsel what he wished the order to say. Thus, in this case, the judge had already reached a firm decision and had played an active role as the decision-maker and had given both sides ample opportunity to present their arguments. In *Bradley v. Maryland Casualty Company,* 382 F.2d 415 (8th Cir. 1967), the Court stated that, while the record was unclear as to what actually occurred, the findings and conclusions at issue were carefully drawn, in detail and related specifically to evidence in the record so that it could conclude that the trial judge had considered the evidence, witnesses and the case in general himself in reaching a decision. *Aiken County v. BSP Div. of Envirotech Corp.,* 866 F.2d 661, *rehearing denied* (4th Cir. 1989), involved the court's adoption, nearly verbatim, of proposed findings of fact and conclusions of law prepared by the prevailing party. However, in this case, the court announced its tentative findings in open court after a 52-day trial and publicly instructed both parties to submit findings of fact and conclusions

of law. Thus, while the losing party did not see the prevailing party's proposed findings and order prior to their adoption, it knew of the submission by the opposing side. None of these cases involve the type of secret *ex parte* contacts that take place between STAB and the Department.

It is imperative that both parties to litigation have a full and fair opportunity to present their cases before an impartial decision-maker. This is a right protected by the Fourteenth Amendment of the United States Constitution. STAB's conduct in contacting the Department *ex parte* in order to have the Department secretly prepare its decisions, and the Department's complicity in this procedure, clearly violates that right.

CONCLUSION

For the foregoing reasons, COST and the Chamber urge this Court to grant Petitioner's Petition for Writ of Certiorari in this case.

Respectfully submitted,

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